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IN THE

Supreme Court of the United States

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October Term, 1970

No. 499

GRINNELL CORPORATION, AMERICAN DISTRICT TELEGRAPH COMPANY, HOLMES ELECTRIC PROTECTIVE COMPANY and AUTOMATIC FIRE ALARM COMPANY,

Petitioners,

v.

RUSS TOGS, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RUSS TOGS, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, defendants below, ask that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this case on May 11, 1970.

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 304 F. Supp. 279 (App. A). The opinion of the Court of Appeals for the Second Circuit has not yet been officially reported (App. C).

Jurisdiction

The order of the Court of Appeals for the Second Circuit was made and entered on May 11, 1970 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

I. Does a government antitrust enforcement action continue to "pend" (so as to suspend the statute of limitations on private antitrust actions under Section 5(b) of the Clayton Act) not only while all issues pertaining to whether defendants violated the antitrust laws are litigated, but also even after those issues have been finally adjudicated, while the Courts determine the appropriate relief?

II. Does a government antitrust enforcement action continue to "pend" (so as to suspend the statute of limitations on private antitrust actions under Section 5(b) of the Clayton Act) for 60 days after a final judgment is entered, despite the fact that no appeal or other review proceedings are taken?

Statutes, Federal Rules and Regulations Involved

Sections 4(b) and 5(a) and (b) of the Clayton Act (15 U.S.C. §§15b, 16(a), 16(b)) are involved in this case.

Section 4(b) of the Clayton Act, 15 U.S.C. §15b, is as follows:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred

unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

Section 5 of the Clayton Act, 15 U.S.C. §16, is as follows:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever

barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Statement of the Case

These are private antitrust actions in which plaintiffs-respondents seek treble damages for alleged violations of the antitrust laws. As *prima facie* evidence of petitioners' alleged violations, plaintiffs seek to rely upon a civil action brought by the government against petitioners in Rhode Island on April 13, 1961 ("the enforcement action"). That action culminated in a November 27, 1964 decision and decree of the District Court (236 F. Supp. 244 [D.R.I.]). This Court affirmed that decree as to liability on June 13, 1966 and remanded for further proceedings in connection with those provisions of the District Court's decree which dealt with relief (384 U.S. 563 [1966]). A District Court judgment which modified the relief provisions of its earlier decree was subsequently filed on July 11, 1967 and no appeal was taken.

The applicable statute of limitations, Section 4(b) of the Clayton Act (15 U.S.C. 15b) provides:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

However, Section 5(b) of the Clayton Act (15 U.S.C. 16 (b)) provides:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or

> punish violations of any of the antitrust laws the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

The present proceeding concerns sixty of the approximately eighty private treble damage actions brought against all or certain of the petitioners (not all of the petitioners herein are defendants in all suits, although the issues raised in this petition affect each defendant) based on the enforcement action. These sixty suits include actions brought in a number of courts (including the Northern District of Illinois) and transferred to the Southern District of New York under 28 U.S.C. 1407 only for pretrial proceedings. After such transfers were completed, the defendants moved for partial summary judgment in the District Court with respect to any claims which may have accrued more than four years prior to the filing of the various complaints. It was defendants' contention below that, as was explicitly and uniformly held in a number of cases in the Seventh Circuit, the government enforcement action ceased to pend on the date (here June 13, 1966) upon which the Supreme Court entered its judgment affirming the District Court's finding of antitrust violation and finally determining all liability issues. None of these

actions was brought within one year from that date. Defendants also argued below that, alternatively, and at the very latest, the enforcement action ceased to pend on July 11, 1967, the day when, following the Supreme Court remand, the District Court entered its final decree, which decree was not further appealed. Four of these actions were brought more than one year after that date.

The District Court below (Metzner, J.) and the Second Circuit adopted a position contrary to that of the Seventh Circuit and rejected both contentions of defendants. Instead, they held that Section 5(b) tolls the statute of limitations until one year and sixty days from the date of the last modification of the final judgment, thus "tacking on" the period within which an appeal might have been taken and having it run consecutively rather than concurrently with the one year provided by the statute.

The courts below thus held the statute of limitations was tolled from April 13, 1961 to September 9, 1968 and denied defendants' motion except for two cases which were brought after that date. They held that the statute of limitations was tolled for two years and three months after this Court in the enforcement action had finally determined all issues pertaining to violations of the antitrust laws and, in so holding, the decision below created a direct conflict between the circuits.

Reasons for Granting the Writ

I. The Decision Below Puts the Courts of Appeal for the Second and Seventh Circuits in Clear Conflict with Respect to a Question of Importance in the Administration of Private Treble Damage Suits Under the Clayton Act. This Court Should Resolve that Conflict.

The decision below should be reviewed to resolve a conflict between Circuits and because of the importance of the question in the administration of the Clayton Act and the private enforcement of the antitrust laws.

Section 5(b) of the Clayton Act (15 U.S.C. 16(b)) suspends the running of the statute of limitations during the "pendency" of a government antitrust suit "and for one year thereafter". In this case (as it has done in a number of other cases and undoubtedly will continue to do in the future), this Court finally determined all issues of liability in a single decision in 1966 and then remanded for further proceedings on relief. Although this is a common occurrence, this Court has never decided whether for tolling purposes the pendency ceases upon final determination of the question of antitrust violation or whether it continues until the final determination of all questions of relief. Moreover, this Court has never determined whether the appeal period, where no appeal is taken, further extends the suspension period despite the addition by Congress in 1955 of a one-year tolling provision beyond the pendency of the government suit.

Clearly, and as is confirmed by the experience of the Judicial Panel on Multidistrict Litigation, there has been a

significant increase in the number of private antitrust treble damage suits. Most of those cases depend upon the tolling provisions here involved for their vitality, and therefore a definitive statement by this Court setting guide lines for determining when a government antitrust suit ceases to pend within the meaning of Section 5(b) is needed.

Particularly is this so when, as now, there is a plain disagreement between the decision of the Second Circuit below and a line of prior decisions in the Seventh Circuit. (See, *Baldwin* v. *Loew's Inc.*, 312 F.2d 387 (7th Cir. 1963); *Grengs* v. *Twentieth Century Fox Film Corporation*, 232 F.2d 325 (7th Cir. 1956), *cert. den.*, 352 U.S. 871 (1956)). The significance of this disagreement is emphasized by the fact that some of the present cases were filed in the Seventh Circuit and were transferred to the Second Circuit only for pre-trial purposes.

These decisions in the Seventh Circuit involved private treble damage suits which also followed a decision in a government enforcement action, the so-called "movie case" (*United States* v. *Paramount Pictures, Inc.*, et seq., *infra*). There a decree of the District Court (70 F. Supp. 53 [S.D.N.Y. 1947]) was affirmed in part and reversed in part in 1948 by this Court which remanded on both questions of liability and relief (334 U.S. 131 (1948)). On February 8, 1950, the District Court entered a judgment in favor of the government disposing of all the issues as to whether there was any violation of the antitrust laws and requiring the submission of plans for divestiture (85 F. Supp. 881 [S.D.N.Y. 1949]). That judgment was affirmed by this Court on June 5, 1950 (339 U.S. 974), and on October 16, 1950 rehearing was denied (340 U.S. 857 [1950]). The District Court then took further evidence and, on February 7,

1952, entered a superseding decree providing for divestiture. (*United States* v. *Loew's Inc.*, 1952-53 Trade Cases Para. 67,228 [S.D.N.Y.]).

Subsequently three cases, each seeking an interpretation of when the "movie case" ceased to pend within the meaning of the former Section 5, were decided in the Seventh Circuit (two in the Court of Appeals and one by the District Court for the Northern District of Illinois). (*Baldwin* v. *Loew's, Inc., supra*; *Grengs* v. *Twentieth Century Fox Film Corporation, supra*; *Tagge* v. *Balaban*, 146 F. Supp. 356 (N.D. Ill. 1956)). All are in conflict with the decision of the Second Circuit below.

In *Baldwin*, the Court found that the "movie case" ceased to pend when the alleged antitrust violations were fully adjudicated:

> "* * * as a matter of law by the Supreme Court denying rehearing in that case on October 16, 1950." 312 F.2d at 391.

In *Grengs*, the Court of Appeals concluded that the government enforcement action continued to pend following the 1948 remand by this Court *only* because questions as to whether there had been a violation of the antitrust laws remained unresolved, stating (232 F. 2d at 332):

> "While we do not hold that the remandment, insofar as it dealt with the *remedy* only, would be significant here, we do believe that it is significant that the Supreme Court held that the question of an illegal monopoly had not been completely passed upon by the district court. It therefore remanded for further action therein on a part of the monopoly question. The

case, as to the latter matter, remained pending until the district court had passed thereon."

In *Tague*, the District Court, in an opinion by now Chief Judge Campbell, left no doubt whatever that a government suit ceases to pend upon the final adjudication that there has been a violation of the antitrust laws. He wrote (146 F. Supp. at 361):

> "It appears certain, therefore, that, for purposes of Section 5 of the Clayton Act, a Government suit ceases to pend when the violations charged in that suit have been resolved and accorded finality by Court decision. What might later be resolved concerning the remedy achieved would have no effect on the pendency of the Government suit."

Along the same lines and more fully, the court said (146 F. Supp. at 360):

> "Therefore, a Government suit ceases to pend for purposes of Section 5, once there has been a final adjudication of some violation of the anti-trust laws which can be evidence to support allegations of the same alleged violations in a suit by a private plaintiff. This is especially so since it is the adjudication of a violation, and not the type and extent of relief granted, that is of evidentiary value to a private plaintiff in a subsequent suit. That the 1950 decree reserved jurisdiction, or for that matter, that the 1952 decree reserved jurisdiction, is insignificant because such reservation of jurisdiction was for purely ministerial purposes, as, for example, the 1950 decree reserved jurisdiction for the working out of plans of divorcement and divestiture from Loew's of its exhibitor holdings."

The *Tague* decision is in accord with the reasoning of the Seventh Circuit Court of Appeals (*Baldwin* v. *Loew's*

Inc., supra; *Grengs* v. *Twentieth Century Fox Film Corp., supra*) and, of course, is clearly opposed to the decision below.

The Courts below put emphasis on this Court's opinion in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965). There, this Court held that a Federal Trade Commission proceeding could toll the statute even though it might afford no *prima facie* effect for damage claimants. The violation-remedy distinction was not in issue. Nevertheless, the district court felt that *Minnesota Mining* "requires us to re-examine the prior law on this question as it has required reconsideration of other questions" and, with the Second Circuit affirming, chose not to follow the Seventh Circuit decisions.

Indeed, the courts below not only failed to follow *Tague* v. *Balaban, supra*, *Baldwin* v. *Loew's Inc., supra*, 312 F.2d 387, 391-392 (7th Cir. 1963) and *Grengs* v. *Twentieth Century Fox Film Corporation*, 232 F.2d 325, 332 (7th Cir. 1956), *cert. den.*, 352 U.S. 871 (1956), but also declined to follow a prior precedent to the same effect as the Seventh Circuit cases in the Southern District of New York, (*Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401 [S.D.N.Y. 1961]) where Judge Dimock wrote (at 404):

> "When the Supreme Court denied rehearing there were decrees in force as to these defendants which fully adjudicated the alleged antitrust violations. The purpose of the consent decrees that followed was merely to provide a method of enforcing the liability which had already been determined. The Paramount action thus ceased to be pending against the appealing de-

fendants * * * when they were denied a rehearing on October 16, 1950."

Not only is the decision below in conflict with other decisions, it is also an erroneous response to this Court's decision in *Minnesota Mining*. The policy considerations underlying *Minnesota Mining* did not, we submit, change the correctness of the Seventh Circuit and Southern District of New York decisions cited above. Indeed, the *Minnesota Mining* case is wholly consistent with the position that when, as here, a judgment is entered as to *all* defendants and is finally affirmed *completely* as to the antitrust violation, the enforcement action ceases to "pend" and private suitors, on notice that a violation has been irrevocably established and that a *prima facie* case is available to them, have one year to take the initial step of filing complaints. Thus, in *Minnesota Mining*, this Court concluded that the purpose of the tolling provision is not only to permit private claimants to use the judgment in a government enforcement action as *prima facie* evidence of an antitrust violation pursuant to Section 5(a) but is also to permit them to benefit from the development of evidence and the resolution of difficult questions of law in the enforcement action, 381 U.S. at 319. It remains true, however, as in *Gregg*, *Teague* and the other decisions noted above, that the major benefits of the enforcement action contemplated in the *Minnesota Mining* decision are available to private suitors by the time a violation is finally determined whether or not questions of relief remain open.

At that time, the record contains all the material on which the finding of violation in the enforcement action was based and which is to be considered in the private ac-

tions by the trial judge in accordance with the teaching of *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951) to determine what is to be given *prima facie* effect. Inasmuch as private antitrust actions are notoriously prolonged, any information developed during continuing proceedings limited to relief issues almost inevitably would be available, if of any benefit, in time for plaintiffs to avail themselves of it. Even assuming, *arguendo*, that an occasional private action might move so expeditiously as to approach the trial stage before completion of the relief proceedings, the trial date could be postponed or a stay could be ordered if there were any reasonable expectation that plaintiffs seeking private damages might be assisted by awaiting completion of the relief proceedings.

The court below also indicated some doubt as to whether this Court, when it remanded the enforcement action in 1966, finally determined "all issues of liability". The concluding paragraph of this Court's decision states, however:

> "The judgment below is affirmed except as to the decree. We remand for further hearings on the nature of the relief consistent with the views expressed herein." 384 U.S. at 583.

Similarly, this Court's judgment, entered the same day, reads as follows:

> "* * * It is ordered and adjudged by this Court that the judgment of the said United States District Court in these causes be, and the same is hereby affirmed, except as to the decree with respect to which it is reversed; and that these causes be, and the same are hereby remanded to the United States District Court for the District of Rhode Island for further hearing

on the nature of the relief consistent with the views expressed in the opinion of this Court."

While the Court of Appeals at one point suggests that this Court did not fully determine liability with respect to whether long-term and title retention contracts were illegal, we believe it clear that by mentioning the "*pros* and *cons*" of such contracts, this Court referred to the scope of the "suitable protective provisions" to be fashioned on remand (384 U.S. at 578), not to whether such practices violated the antitrust laws. That is why the discussion of those contracts is found only in Part II of this Court's opinion, dealing with relief, and not in Part I, which dealt with issues of liability. Similarly, after remand, Judge Wyzanski indicated that he believed that his duties were limited to deciding "the nature of relief which is appropriate in this case" [Appendix in the Second Circuit, 70a].

We submit, in short, that defendants' antitrust violation was irrevocably fixed when, in June 1966, this Court issued its judgment, and the courts below erred when they suggested otherwise.*

* The court below also relied upon its prior opinion in *Fifth and Walnut, Inc.* v. *Loew's Inc.*, 176 F.2d 587, 593-94 (2d Cir.), *cert. den.*, 338 U.S. 894 (1949), as holding that there can be no *prima facie* evidence until a decree is entered which resolves all issues of relief as well as liability. We do not believe that the case is relevant here, since it involved only the 1948 decree in the movie cases which, unlike the 1950 decree, did not resolve all issues of liability. In addition, we note that under common law rules of collateral estoppel (referred to in §5(a)) a prior case may have collateral estoppel effect on issues which have been finally determined even if other issues remain open for determination on remand. *Developments in the Law —Res Judicata*, 65 Harv.L.Rev. 818, 835 (1952). One subsidiary question which this Court may wish to consider is thus whether the lower court did not adopt too restrictive a view of "finality" under §5(a) of the Clayton Act.

II. The Decision Below in Adding a Further Sixty Days to the Additional Twelve Months Congress Provided the Statute of Limitations Would be Tolled After a Government Action Ceases to Pend Is Contrary to Clearly Expressed Congressional Intent. This Is the First Time this Question Has Been Posed, Although It Should Arise in Many Cases. This Court Should Resolve this Question and Uphold the Expressed Intent of Congress.

The Court below not only extended the tolling period to cover subsequent negotiations and judicial proceedings with respect to modification of the relief provisions of the decree (most of which were entered on consent in the instant case), but added another two months by including the time to appeal from the provisions of the decree with respect to relief. This, too, is unprecedented since the 1955 amendment added a one year post-decree tolling period and is also wrong. As the report of the Senate Judiciary Committee recommending passage of the 1955 amendment made clear, the additional period of tolling was solely for one year and was designed and deemed sufficient without more to carry out Congress' policy. More specifically, the Senate Report said (S.Rep. No. 619, 84th Cong., 1st Sess., (1955)):

> "There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Govern-

ment's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings."

Conclusion

This Court is presented with a conflict between Circuits, on an important question involving the extent of the statute of limitations that will have great impact upon the administration of the antitrust laws. The decision below conflicts with decisions in another Circuit and improperly and unwisely extends the period during which the statute of limitations is suspended following government antitrust litigation. This Court should, therefore, review the decision below.

Respectfully submitted,

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Dated: July 23, 1970

APPENDICES

Appendix A

Opinion of the District Court

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 67 Civ. 2594.*

RUSS TOGS, INC. *et al.*,

Plaintiffs,

v.

GRINNELL CORPORATION *et al.*,

Defendants.

Oct. 2, 1969

*And other actions in this court bearing S.D.N.Y. file numbers as follows:

67 Civ. 2595	67 Civ. 2615	67 Civ. 3820
67 Civ. 2596	67 Civ. 2616	67 Civ. 4433
67 Civ. 2606	67 Civ. 2621	67 Civ. 4719
67 Civ. 2610	67 Civ. 2622	67 Civ. 4720
67 Civ. 2612	67 Civ. 2940	
68 Civ. 573	68 Civ. 2741	68 Civ. 2780
68 Civ. 574	68 Civ. 2742	68 Civ. 2781
68 Civ. 659	68 Civ. 2743	68 Civ. 2782
68 Civ. 2361	68 Civ. 2744	68 Civ. 2789
68 Civ. 2509	68 Civ. 2746	68 Civ. 2793
68 Civ. 2647	68 Civ. 2765	68 Civ. 2794
68 Civ. 2669	68 Civ. 2766	68 Civ. 2795
68 Civ. 2670	68 Civ. 2774	68 Civ. 2828
68 Civ. 2671	68 Civ. 2775	68 Civ. 2829
68 Civ. 2722	68 Civ. 2776	68 Civ. 3229
68 Civ. 2723	68 Civ. 2779	68 Civ. 4629
69 Civ. 1357	69 Civ. 1417	

And other file numbers as follows:

N.D. Cal. Civ. 49577	S.D.N.Y. 68 Civ. 4024
W.D.N.Y. Civ. 1968-210	S.D.N.Y. 68 Civ. 4025
E.D. Pa. 68 Civ. 1478	S.D.N.Y. 68 Civ. 4026
E.D. Pa. 68 Civ. 1479	S.D.N.Y. 68 Civ. 4027
E.D. Pa. 68 Civ. 1489	S.D.N.Y. 68 Civ. 4028
E.D. Pa. 68 Civ. 1490	S.D.N.Y. 68 Civ. 4029
N.D. Ala. 67 Civ. 471	S.D.N.Y. 68 Civ. 4038
N.D. Ill. 68 C. 331	S.D.N.Y. 68 Civ. 4358
N.D. Ill. 68 C. 1667	S.D.N.Y. 68 Civ. 4637
N.D. Ill. 68 C. 1662	S.D.N.Y. 68 Civ. 4638
N.D. Ill. 68 C. 1663	S.D.N.Y. 68 Civ. 4639
N.D. Ill. 67 C. 1167	S.D.N.Y. 68 Civ. 4357
N.D.J. Civ. 763-68	S.D.N.Y. 68 Civ. 4621

METZNER, District Judge.

Defendants in these private antitrust actions move for partial summary judgment with respect to any claims which may have accrued more than four years prior to the filing of the respective complaints on the ground that such claims are barred by the applicable statute of limitations. §4B of the Clayton Act, 15 U.S.C. §15b, provides:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

The plaintiffs resist the motion, relying on §5(b) of the Clayton Act, 15 U.S.C. §16(b), which provides:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws * * *, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: * * *."

They contend that they commenced their actions "during the pendency" of the government's suit or within a year

thereafter, and thus are entitled to the tolling period provided by §5(b) in determining the bar of §4B. At issue is the exact time when the government's suit ceased to "pend."

On April 13, 1961, the government filed a civil action against all four defendants in the District Court of Rhode Island, seeking injunctive relief for violations of the antitrust laws. United States v. Grinnell Corp., Civ. No. 2785. On November 27, 1964, the district court filed its findings of fact, conclusions of law and final decree in that action (236 F.Supp. 244), holding that defendants had violated §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. All parties appealed, the government because it deemed the relief inadequate and the defendants on both the merits and relief.

On June 13, 1966, the Supreme Court held that "The judgment below is affirmed except as to the decree. We remand for further hearings on the nature of the relief consistent with the views expressed herein." 384 U.S. 563, 583, 86 S. Ct. 1698, 1710, 16 L.Ed.2d.778. The mandate on the opinion issued on July 8, 1966 and was filed in the district court on July 11, 1966. On July 11, 1967, the district court entered a final judgment detailing the relief to be granted against defendants in which it was stated "The effective date of this Judgment shall be November 1, 1967."

Defendants argue that the government enforcement action ceased to pend on June 13, 1966, the date of the opinion of the Supreme Court. In their view, the tolling provision of §5(b) expired on June 13, 1967, one year after the date of the Court's opinion. Therefore, any private suit instituted after that date should be governed by the four-

year provision of §4B. Plaintiffs take the position that the government action continued pending at least until July 11, 1967, the date of the district court's second decree, so that plaintiffs who filed on or before July 11, 1968 can survive this motion. Certain of these plaintiffs who filed after July 11, 1968 argue that the enforcement action was pending until September 9, 1967, the date when the time to appeal from the second decree expired.

It is defendants' contention that the opinion of the Supreme Court conclusively determined all questions of liability when it affirmed each finding of antitrust violation and the only remaining task for the district court was to work out the relief to be ordered against the defendants. As soon as liability has been determined, the argument runs, defendants' victims have all the information they need to decide whether to sue, and they can not be prejudiced if the one-year extension begins to run from that time. Furthermore, they contend that defendants will be unduly prejudiced during the years usually necessary to work out the final details of relief, since they will needlessly remain open to private actions on stale claims.

This liability-relief distinction fails for a number of reasons. In the first place, it does not fit well with the plain language of §5(b). That section tolls the statute of limitations "during the pendency" of "any civil or criminal proceeding * * * instituted by the United States" and for a year thereafter. If the draftsmen had meant to toll the statute only during the pendency of that part of the proceeding in which liability is determined, they would presumably have used different language to make clear their intent.

A proceeding "pends" until it is terminated. The legislative history and case law support the intention to use this plain meaning in this statute. President Wilson's speech of January 20, 1914, asking Congress to give private litigants the benefits of government enforcement actions, urged that "the statute of limitations * * * be suffered to run against such litigants only from the date of the *conclusion* of the Government's action." 51 Cong.Rec. 1964 (1914) (emphasis added). The Senate report which accompanied the amendment of §5(b) stated:

> "To alleviate such difficulties, the present bill would extend the tolling period not only for the *duration* of the Government's antitrust suit, but for 1 year thereafter." (Emphasis added). Senate Report No. 619, 84th Cong. 1st Sess. (1955), 2 U.S. Code Cong. & Admin. News, pp. 2328, 2332.

Similarly, in Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), the court said at page 569:

> "The corollary purpose of the tolling provisions * * * is to vouchsafe the intended benefits or related government proceedings by suspending the running of the statute of limitations until the *termination* of the government proceedings, and allowing the private suitor one year thereafter in which to prepare and file his suit." (Emphasis added) (footnote omitted).

This court has held in an unreported decision that the statute is tolled in order to permit the private litigant to rely on the fruits of the government litigation, and that "These fruits have not ripened until they are embraced in a piece of paper called a final judgment as to which the appellate process has been exhausted." Gottesman v. General Motors Corp., Civ. 121-251 (S.D.N.Y. March 15, 1963).

In addition to the plain meaning of the language of the statute, the Supreme Court's broad application of the policy of §5(b) in Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965), buttresses the finding that the tolling provision extends to the termination of the entire controversy. There the Court said at page 317, 85 S.Ct. at page 1477:

> "Whatever ambiguities may exist in the legislative history of these provisions [§§5(a) and 5(b)] as to other questions, it is plain that in §5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions."

The court went on to list possible benefits other than the judgment itself which could be available to private litigants, such as pleadings, transcripts of testimony, exhibits and documents.

"If defendants' liability-relief distinction is adopted, victims of an antitrust violator may often have to decide whether or not to bring suit before all the benefits listed in the *Minnesota Mining* case, *supra*, are available to them. The prime benefit is use of the judgment as prima facie evidence as permitted by §5(a) of the Clayton Act, 15 U.S.C. §16(a).[1]

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1. "A final judgment or decree * * * rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws * * * as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto * * *."

In Fifth & Walnut, Inc. v. Loew's Inc., 176 F.2d 587 (2d Cir. 1949), the Court of Appeals held that in most cases this prime benefit was unavailable until final judgment. There the plaintiffs sought to use a district court decree in a government enforcement suit in which, on appeal, "the Supreme Court * * * accepted the basic findings of illegality and * * * sent the cases back for more complete relief." Id. at 593. The Court of Appeals held that the words "final judgment or decree" mean just what they say, and ruled against the plaintiff. It is inconceivable, under the broad purposes of §5(b) to aid private litigants, that the government action has ceased to pend before there is a judgment available for use under §5(a).

The Court of Appeals indicated in *Fifth & Walnut*, *supra*, that in an extreme situation a decree which did not dispose of every single issue of relief could possibly be admissible under §5(a). In the instant case, as in *Fifth & Walnut*, this exception does not apply, for the appellate decision in the enforcement action left important matters affecting relief open for determination on remand. The Supreme Court's own opinion referred to the "extensive changes necessary in the decree." United States v. Grinnell Corp., 384 U.S. 563, 580, 86 S.Ct. 1698, 1708 (1966). The proceedings to decide the details of the relief order may produce some of the benefits referred to in *Minnesota Mining*, *supra*, such as documents and evidence useful to private litigants. In the instant case this is obvious from the Court's discussion regarding the relief phase of the case. 384 U.S. 563, 577-580, 86 S.Ct. 1698. The suit should pend until all these benefits become available.

Finally, plaintiffs should be given a definite, easily identifiable date which fixes the end of the tolling period.

In *Minnesota Mining, supra*, the Court stated that §5(a) and §5(b) "are not necessarily coextensive; they are governed by different considerations as well as congressional policy objectives." 381 U.S. at 318, 85 S.Ct. at 1477. Thus while it might be possible in the extreme situation referred to in *Fifth & Walnut, supra*, to have an admissible judgment under §5(a) which is not final as to relief, such a judgment is not effective for §5(b) purposes. Congressional policy is better served by a test which is easily applied. Neither plaintiffs nor the courts should be called upon in this area to make fine distinctions which would be required under defendants' liability-relief theory.

Defendants refer us to a number of cases antedating *Minnesota Mining* which adopt their relief-liability distinction.[2] The *Minnesota Mining* case, however, requires us to reexamine the prior law on this question as it has required reconsideration of other questions. Before the *Minnesota Mining* decision, for instance, the courts had held under §5(b) that an enforcement action ceased pending as to each defendant when a final decree was entered against him. See Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F.2d 284, 292 (7th Cir. 1954); Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 193 F. Supp. 401, 404 (S.D.N.Y. 1961) (by implication); Manny v. Warner Bros. Pictures, Inc., 116 F. Supp. 807, 809-810 (S.D. Cal. 1953). Since the date of the *Minnesota Mining* decision, in order to preserve fully the benefits referred

2. Baldwin v. Loew's Inc., 312 F.2d 387, 391-392 (7th Cir. 1963); Grengs v. Twentieth Century Fox Film Corp., 232 F.2d 325, 332 (7th Cir.) (dictum), cert. denied, 352 U.S. 871, 77 S.Ct. 96, 1 L.Ed.2d 77 (1956); Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 193 F.Supp. 401, 404 (S.D.N.Y.1961); Tague v. Balaban, 146 F.Supp. 356 (N.D.Ill.1956).

to by the Court and to provide an easily identified time when the tolling period ends, the courts have held that an enforcement action continues pending against each defendant until final decrees have been entered against all of them. See New Jersey v. Morton Salt Co., 387 F.2d 94, 98-99 (3d Cir. 1967), cert. denied, International Salt Co. v. New Jersey, Cayuga Rock Salt Co. v. New Jersey, 391 U.S. 967, 88 S. Ct. 2035, 20 L. Ed. 2d 880 (1968); Michigan v. Morton Salt Co., 259 F. Supp. 35, 46-50 (D.Minn. 1966), aff'd sub nom. Hardy Salt Co. v. Illinois, 377 F. 2d 768 (8th Cir.), cert. denied, 389 U.S. 912, 88 S. Ct. 238, 19 L. Ed. 2d 260 (1967). Further, it was held in Leh v. General Petroleum Corp., 382 U.S. 54, 86 S. Ct. 203, 15 L. Ed. 2d 134 (1965), that, in applying §5(b), the question whether a private suit is based on "matter complained of" in the enforcement action should not be determined, as it heretofore had been, by the constricting principles of collateral estoppel of §5(a). Finally, the rule that the statute was not tolled as to individuals not named as defendants in the enforcement action, established by numerous cases prior to 1965, see 2 Trade Reg. Rep. ¶¶9159.40-50, has been abandoned in recent decisions. *New Jersey, supra;* Hardy Salt Co. v. Illinois, *supra*; Vermont v. Cayuga Rock Salt Co., 276 F. Supp. 970 (D.Me. 1967).

For all of the above reasons, the tolling period expires one year from the date when the appellate process is exhausted as to a final judgment. Exhaustion of appellate process includes the expiration of the time within which to take an appeal. In these cases the earliest date for expiration of the tolling of the statute is September 9, 1968.[3]

Settle order.

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3. I do not have to consider the impact of the effective date of the judgment in deciding these cases.

Appendix B

Order of the District Court

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 67 Civ. 2594*

RUSS TOGS, INC., *et al.*,

Plaintiffs,

v.

GRINNELL CORPORATION, *et al.*,

Defendants.

Oct. 2, 1969

Now, defendants having moved for partial summary judgment with respect to any claims which may have accrued more than four years prior to the filing of the respective complaints, and the parties having submitted affidavits with respect to said motion, and this Court having rendered its decision on October 3, 1969,

IT IS HEREBY ORDERED, that the said motion of defendants for partial summary judgment is hereby denied, except that such motion is granted with respect to the following actions in which the complaints were filed after September 9, 1968:

M. H. Fishman Co., Inc. v. *Grinnell Corporation, et al.*, S.D.N.Y. 69 Civ. 1357; and

* And other actions in this court bearing S.D.N.Y. file numbers [see Appendix A].

M. N. Landau Stores, Inc. v. Grinnell Corporation, et al., S.D.N.Y. 69 Civ. 1417.

This order, and the Court's decision of October 3, 1969, insofar as they deny defendants' motion, involve a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from this order pursuant to 28 U.S.C. §1292(b) may materially advance the ultimate termination of the litigation.

Dated: October 30, 1969

Charles M. Metzner
U.S.D.J.

Appendix C

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 639-42—September Term, 1969

(Argued March 26, 1970 Decided May 11, 1970)

Docket Nos. 34427, 34439, 34529, 34541

RUSS TOGS, INC., *et al.*,

Plaintiffs-Appellees,

v.

GRINNELL CORPORATION, *et al.*,

Defendants-Appellants.

Before:

LUMBARD, Chief Judge, HAYS, Circuit Judge, and BLUMENFELD, District Judge.*

Consolidated interlocutory appeals from so much of an order of the United States District Court for the Southern District of New York, Charles M. Metzner, Judge, as denied appellants' motion for partial summary judgment based on the statute of limitations in sixty private antitrust treble damage actions. Affirmed.

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* Of the District of Connecticut, sitting by designation.

HAYS, Circuit Judge:

These are appeals from an order of the United States District Court for the Southern District of New York denying appellants' motion for partial summary judgment in these sixty private antitrust treble damage actions. Permission to appeal from the interlocutory order was granted by this court pursuant to 28 U.S.C. §1292(b) (1964). The appeals were consolidated by stipulation of the parties.

Appellants American District Telegraph Company, Holmes Electric Protective Company and Automatic Fire Alarm Company are engaged in the business of providing "central station protective services" to customers at whose establishments are automatic fire and burglary alarm systems. The majority of the stock of each of these appellants was formerly held by appellant Grinnell Corporation.

Appellees base their private antitrust treble damage actions in whole or in part on a civil action brought by the United States against appellants in the United States District Court for the District of Rhode Island seeking injunctive relief for violations of the antitrust laws. The complaint in the government's action was filed on April 13, 1961. On November 27, 1964, the district court issued its findings of fact, conclusions of law and final decree holding that appellants had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (1964). *United States* v. *Grinnell Corp.*, 236 F.Supp. 244 (D.R.I. 1964). All parties appealed, the United States because it deemed the relief inadequate and the appellants herein on both the merits and the relief.

On June 13, 1966, the Supreme Court affirmed the judgment of the district court "except as to the decree" and

remanded "for further hearings on the nature of the relief consistent with the views expressed herein." *United States v. Grinnell Corp.*, 384 U.S. 563, 583. No petition for rehearing having been filed, the Supreme Court's mandate issued as of course on July 8, 1966, and was filed in the district court on July 11, 1966. On July 11, 1967, the district court, having held evidentiary hearings on some of the issues left open on remand as to which the parties could reach no agreement, entered a final decree detailing the relief granted.

The sole issue presented on this appeal is when the government's civil enforcement action ceased to pend, with the result that private actions filed more than one year thereafter could not benefit from the suspension of the applicable statute of limitations provided by Section 5(b) of the Clayton Act, as amended, 15 U.S.C. §16(b) (1964).

The applicable statute of limitations, 15 U.S.C. §15b (1964) (Section 4B of the Clayton Act, as amended), provides:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

This period may be tolled, however, by the operation of Section 5(b), which provides:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws * * * the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the

pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Appellants contend that the government enforcement action ceased to pend on June 13, 1966, the date of the Supreme Court's decision. All 60 cases involved in this appeal were instituted more than one year after this date. Alternatively, appellants argue that the government action ceased to pend on July 11, 1967, the date of the district court's final decree, from which no appeal was taken. Four of the 60 cases were instituted more than one year after this date. Appellees, on the other hand, take the position that the government enforcement action continued to pend until September 9, 1967, the date when the time to appeal from the final decree expired. All 60 cases were filed less than one year after this date.[1]

The district court held that the government enforcement action continued to pend until the termination of the entire controversy and that, therefore, Section 5(b) tolled the statute of limitations until one year "from the date when the appellate process [was] exhausted as to a final judgment." Stating that "Exhaustion of appellate process includes the expiration of the time within which to take an appeal," the district court set September 9, 1968 as the date of expiration of the tolling period. The district court accordingly denied appellants' motion for partial

1. Alternatively, appellees argue that the government action continued to pend at least until the date of the district court's final decree.

summary judgment in the 60 private actions involved in this appeal, all of which were filed before this date.[2]

We affirm the decision of the district court.

II.

The basic inquiry in this case is "whether congressional purpose is effectuated" by holding that a government enforcement action continues to pend until the expiration of the time to appeal from the final decree resolving all issues of liability and relief. *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424, 427 (1965).

Appellants contend that the congressional purpose behind Section 5(b) is fully effectuated if a government enforcement action is held to cease to pend as soon as all issues of liability for violation of the antitrust laws have been conclusively and finally established in a judgment, even though further proceedings relating to relief may be necessary. They argue that drawing this distinction between liability and relief permits private plaintiffs to make full use of the benefits derived from a government enforcement action, and prevents needless prolongation of the time to file private claims.

Appellants point out that the 1955 amendments to Section 5 of the Clayton Act were inspired by a concern that some state statutes of limitations, applicable under preexisting law, provided unduly long periods of time for bringing suit. Congress' solution to this problem was to replace diverse state laws with a uniform federal rule re-

2. The motion was granted with respect to two actions filed after September 9, 1968. These actions have been voluntarily discontinued.

quiring that private antitrust actions be brought within four years of accrual or within one year after a government enforcement action ceased to pend. See S. Rep. No. 619, 84th Cong., 1st Sess. (1955) in 1955 U.S. Code Cong. & Admin. News 2332-33. However, the legislative history does not support the contention that Congress also intended to meet the problem of stale claims by giving to the word "pendency" the unnatural meaning appellants seek to ascribe to it. In describing the length of the period encompassed by the word "pendency," the Senate Report accompanying the 1955 amendments to the Clayton Act consistently refers to the "*duration*" of the government's antitrust suit; it states that a private action must be brought within one year "after the Government's case has been *concluded*" or, in another instance, within one year "after the Government suit [has been] *terminated*." S. Rep. No. 619, *supra*. (Emphasis added.) The choice of such words to describe the pendency of a government enforcement action hardly shows an intention to limit the "pendency" of that action to the liability phase only. A better interpretation is that the term "pendency" in Section 5(b) was meant to refer to all proceedings in the government action until its termination in a final decree disposing of issues.

In urging that we adopt their liability-remedy distinction, appellants rely upon a line of decisions in private antitrust suits, which grew out of government proceedings against the motion picture industry.[3] See *Baldwin* v. *Loew's, Inc.*, 312 F.2d 387, 391-92 (7th Cir. 1963); *Gyongs* v. *Twentieth Century Fox Film Corp.*, 232 F.2d 325, 332

3. See *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

(7th Cir.) (dictum), cert. denied, 352 U.S. 871 (1956); *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401, 404 (S.D.N.Y. 1961); *Tague* v. *Balaban*, 146 F. Supp. 356, 360 (N.D. Ill. 1956). Although the cases are readily distinguishable from the instant one in terms of the practical importance to private litigants of the issues of relief left open,[4] these decisions lend some support to appellants' position that a government enforcement action ceases to pend upon completion of its liability phase. However, in the light of more recent developments in the interpretation of Section 5(b), we do not believe these cases are controlling.

All of the cases antedate the Supreme Court's decision in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), and were decided under Section 5 as it existed prior to amendment in 1955.[5] The

4. In the *Paramount* proceedings, with which these cases were concerned, the Supreme Court had affirmed, after a prior remand, the district court's final decree which left open only the details of divestiture. See *United States* v. *Loew's, Inc.*, 1950-1951 CCH Trade Cas. ¶62573 (S.D.N.Y.), aff'd, 339 U.S. 974, (1950). The cases held that the government action ceased to pend upon the Supreme Court's denial of a rehearing rather than upon the date of a subsequent district court decree containing final plans of divestiture. See *Baldwin* v. *Loew's Inc.*, 312 F.2d 387, 391-92 (7th Cir. 1963); *Tague* v. *Balaban*, 146 F. Supp. 356, 360 (N.D. Ill. 1956). In the instant case, the Supreme Court's remand left open much more than the details of divestiture. In fact, it was not until the district court's second and final decree that the specific practices enjoined were defined.

5. Section 5, 38 Stat. 731, provided:

> "That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or

decisions were based upon the premise that the tolling provisions of Section 5 were coextensive with the evidentiary provisions[6] and did not extend to the protection of other benefits accruing from the government proceedings. See *Hardy Salt Co.* v. *Illinois*, 377 F.2d 768, 770-71 (8th Cir.), cert. denied, 389 U.S. 912 (1967).

In *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, *supra*, the Supreme Court rejected the view that the scope of Section 5(b) was "necessarily coextensive" with the scope of Section 5(a) and adopted a broad interpretation of the scope of the benefits accorded to the

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decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

6. Now Section 5(a) of the Clayton Act, as amended, 15 U.S.C. §16(a) (1964), which provides:

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

private litigant by Section 5(b) beyond the limitations of Section 5(a). Noting that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws," *id.* at 318,[7] and that "it is plain that in §5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions," *id.* at 317, the Court said:

> "It may be * * * that when it was enacted the tolling provision was a logical backstop for the prima facie evidence clause of §5(a). But even though §5(b) complements §5(a) in this respect by permitting a litigant to await the outcome of government proceedings and use any judgment or decree rendered therein—a benefit which often is of limited practical value—it is certainly not restricted to that effect. As we have pointed out, the textual distinctions as well as the policy basis of §5(b) indicate that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. In fact, the rules of the Commission so provide. 16 CFR §1.132(c). See generally 16 CFR §1.131 *et seq.* Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties. * * *
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7. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131 (1969); *Leh* v. *General Petroleum Corp.*, 382 U.S. 54, 59 (1965).

> "* * * In this connection, and of crucial significance, is the fact that the potential advantages available to such litigants because of §5(b) reach far beyond the specific and limited benefits accruing to them under §5(a). * * *" (Footnote omitted.) *Id.* at 319-20.

Also see *Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561, 569 (10th Cir. 1961), appeal dismissed sub nom. *Wade* v. *Union Carbide and Carbon Corp.*, 371 U.S. 801 (1962).

Subsequent decisions have reaffirmed the *Minnesota Mining* interpretation of Section 5(b) and have implemented its policies, abandoning prior rules. See, e.g., *Leh* v. *General Petroleum Corp.*, 382 U.S. 54 (1965) (collateral estoppel principles of Section 5(a) are not determinative on the issue of whether a private action is "based in whole or in part on any matter complained of" in the government enforcement action); *New Jersey* v. *Morton Salt Co.*, 387 F.2d 94 (3d Cir. 1967), cert. denied sub nom. *International Salt* v. *New Jersey*, 391 U.S. 967 (1968) (enforcement action continues to pend against each defendant until final decrees have been entered against all); *Hardy Salt Co. v. Illinois, supra.*

III.

We believe the policies behind Section 5(b), as expressed in the *Minnesota Mining* decision, are best effectuated by holding that a government enforcement action continues to pend until it has been terminated in a final decree resolving all issues of liability and relief.[8] The full bene-

8. We do not hold that the "pendency" of the government action includes the period subsequent to a final decree during which the court exercises continuing jurisdiction for purposes of modification and enforcement under the usual retention of jurisdiction clause.

fits of government proceedings are not available until there has been a final determination in the action, including a final determination on the relief to be granted. Remand proceedings, even if limited to issues of relief, may generate evidence and legal rulings of value to the private litigant. Other benefits may accrue only upon termination of the government proceedings:

> "An intelligent evaluation of the Government's case can only be made at the conclusion of the entire lawsuit. Before the Government litigation is entirely concluded, the private plaintiff may not be in a position to assess the strength of his case against a particular defendant, or even to formulate a complaint. In addition, during the pendency of the Government litigation, transcripts, documents and exhibits may not be readily available to him." *Michigan v. Morton Salt Co.*, 259 F.Supp. 35, 50 (D.Mich. 1966), aff'd sub nom. *Hardy Salt Co.* v. *Illinois*, *supra*.

Moreover, often ultimate liability in government enforcement actions can be defined only in terms of the relief granted. This is quite arguably true in the instant case. The Supreme Court's decision, *United States* v. *Grinnell Corp.*, *supra*, left important matters open for determination on remand. The Court found it impossible to resolve on the record before it the extent to which long term contract and title retention requirements imposed on central station protective service subscribers constituted substantial barriers to competition requiring protective provisions. The district court was directed to explore the various aspects of the issue on remand and to fashion suitable protective provisions to deprive the two devices of whatever coercive power they might be found to have. 384 U.S. at

578. The Court also directed the district court to replace its broad and generalized restraining order with one specifically enjoining the precise practices found to have violated the Act. *Id.* at 579. Thus, significant issues remained to be decided by the district court. In this sense the Supreme Court's decision did not finally determine all issues of liability. The situation illustrates the conceptual difficulties which arise from an attempt to use appellants' distinction between liability and relief.

The interrelationship between the liability and relief phases of a government antitrust proceeding was recognized by the Supreme Court in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 485 (1968). There the Court said that in determining whether an issue was actually adjudicated in a government enforcement action, and thus available as prima facie evidence, it is proper to look to earlier findings, opinions and decrees, both "with respect to violation and * * * with respect to remedy." *Id.* See also *Gottesman v. General Motors Corp.*, 414 F.2d 956, 964 (2d Cir. 1969).

Our decision in *Fifth and Walnut, Inc. v. Loew's, Inc.*, 176 F.2d 587, 593-94 (2d Cir.), cert. denied, 338 U.S. 894 (1949), implicitly recognizes the danger of making too fine a distinction between liability and relief. In that case we held that only "a final and definitely settled" decree upon the "definite terminus of the litigation" may be introduced as prima facie evidence in a private treble damage action. Although we noted that in "an extreme situation," a decree disposing of "practically all the issues involved" might be admissible, we found that the issues left open for resolution on remand by the Supreme Court's decision in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131

(1948), whether pertaining to liability or to relief, were "so complex and vague" as to preclude the use of the findings or decree as prima facie evidence in a private action. Since it is now clear that Section 5(b) is more than a protective complement to Section 5(a), we believe the rule we adopt in this case represents the logical sequel to our decision in *Fifth and Walnut, Inc.* v. *Loew's, Inc.*

IV.

Finally, we believe the "pendency" of a government enforcement action continues until the expiration of the time to appeal from the final decree resolving all issues of liability and relief. A judgment or decree in a government enforcement action becomes "final" only when the government and the defendants are satisfied with the result and determine not to appeal. Therefore, only after the time to appeal has expired can private litigants rely on the irrevocability of determinations made in the government action. *Twentieth Century Fox* v. *Brookside Theatre Corp.*, 194 F.2d 846, 857-58 (8th Cir.), cert. denied, 343 U.S. 942 (1952).

The 1955 amendments to the Clayton Act provide that private litigants must sue within one year after the government enforcement action ceases to pend if they wish to take advantage of the tolling provisions of Section 5(b). Previously the unexpired portion of the applicable state statute of limitations, whether of one day's duration or of five years' duration, was simply tacked on after the date the government action ceased to pend. Appellants argue that the judicially created grace of the appeal period is now no longer necessary and should be subsumed in the

one year period of "grace" provided by Congress. Neither the explicit language of Section 5(b) nor its legislative history supports this contention. To hold that the pendency of a government action does not include the time within which an appeal may be taken would have the effect of reducing the one year period to ten months. We do not believe Congress intended this result. Moreover, in view of the broad purposes of Section 5(b), any doubt as to the meaning of the tolling provision should be resolved "in a way which will permit a determination on their merits of private claims. * * *" *New Jersey* v. *Morton Salt Co.*, *supra* at 97.

We hold that the government action against appellants continued to pend until September 9, 1967, the date when the time to appeal from the district court's final decree of July 11, 1967, expired. See 28 U.S.C. §2101(b) (1964). All appellees filed their private actions within one year from this date. Accordingly, we affirm the order of the district court denying appellants' motion for partial summary judgment against appellees based on the statute of limitations.

Appendix D

Order of the Court of Appeals

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of May, one thousand nine hundred and seventy.

Present:

Hon. J. EDWARD LUMBARD, Chief Judge
Hon. PAUL R. HAYS, Circuit Judge
Hon. H. JOSEPH BLUMENFELD, District Judge.

RUSS TOGS,
Plaintiffs-Appellees,

v.

GRINNELL CORPORATION, *et al.*,
Defendants-Appellants.

(and 46 other cases)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, *it is now hereby ordered*, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. Daniel Fusaro
Clerk